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LICATA & TYRRELL P.C.
66 E. MAIN STREET
MARLTON, NJ 08053

EXAMINER	
GANEY, STEVEN J	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/738,323
Filing Date: December 16, 2003
Appellant(s): BODEN ET AL.

Jane Massey Licata
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 25, 2007 appealing from the Office action mailed July 24, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

This appeal involves claims 1 and 3-7.

Claim 2 has been canceled.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is substantially correct.

In regard to appellant's statement that "Claim 1 defines a dispensing device for storing and diffusing an active gel into the ambient atmosphere at a slow controlled rate", note the claim only positively recites "the emanator diffuses active gel into the ambient atmosphere by the process of evaporation", not "at a slow controlled rate".

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows:

Claims 1 and 3-7 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Wefler et al(U.S. Patent No. 5,903,710) in view of Orson, Sr (U.S. Patent No. 5,081,104).

NEW GROUND(S) OF REJECTION

Claims 1 and 3-6 stand rejected under 35 U.S.C. 102(b) as being anticipated by Orson, Sr. (U.S. Patent No. 5,081,104).

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,903,710	WEFLER et al.	5-1999
5,081,104	ORSON, Sr.	1-1992

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

2. Claims 1 and 3-7 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Wefler et al in view of Orson, Sr.

Wefler et al discloses a dispensing device comprising all the featured elements of the instant invention, note active gel col. 4, line 32 and wick col. 4, lines 54-65, except for the specific oil or fragrance present in the active gel in the claimed range be percent weight and the emanator in physical contact with the end of the wick opposite the reservoir. With respect to appellant's statements of intended use, i.e. (for storing an active gel comprising an oil or fragrance present in the active gel at about 90 to 99.8 percent by weight), the apparatus of Wefler et al is capable of performing appellant's intended use and would perform equally as well with the claimed active gel and oil/fragrance percent weight range. Also, it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the oil or fragrance in the percent by weight range in the active gel, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPW 233. Orson, Sr. discloses a dispensing device comprising an active gel, col. 8, lines 2-37, and a wick with an emanator in physical contact with the wick, col. 6, lines 39-68. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide an emanator for the wick of Wefler et al, as taught by Orson, Sr. since with such a modification the addition of the emanator facilitates diffusion of the oil or fragrance into the surrounding environment by the process of evaporation.

As to claim 7, note col. 5, lines 33 and 34 and "p-dichlorobenzene" of Wefler et al.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1 and 3-6 stand rejected under 35 U.S.C. 102(b) as being anticipated by Orson, Sr.

Orson, Sr. discloses all the featured elements of the instant invention, note a reservoir for storing an active fragrance gel; a polymeric or fibrous wick with two ends, one end in the gel and an emanator in physical contact with end of the wick opposite the reservoir. See col. 6, lines 39-68 and col. 8, lines 2-37.

With respect to appellant's statements of intended use, i.e. (for storing an active gel comprising an oil or fragrance present in the active gel at about 90 to 99.8 percent by weight), the device of Orson, Sr. is capable of performing appellant's intended use, therefore, the claims are fully anticipated. The claim only requires a reservoir, which the Orson, Sr. reference discloses and therefore meets the claim limitation since it is capable of storing an active gel comprising an oil or fragrance present in the active gel at about 90 to 99.8 percent by weight.

In regard to claim 6, the recitation is merely further limiting appellant's intended use for storing an active gel.

(10) Response to Argument

Appellant argues that there would have been no rationale for the skilled artisan to look to Orson, Sr. for an emanator to facilitate diffusion of a fragrance into the atmosphere as the

teachings of Wefler et al resolve the issue of facilitating diffusion of an oil or fragrance into the atmosphere by employing a heating element for heat-promotion of the air freshener. Note in Orson, Sr. col. 6, lines 41-52, where it is disclosed that the fragrance evaporates and is dispensed by diffusion with or without the assistance of a heating device. Therefore, Orson, Sr. teaches that an emanator and wick combination can be used with a heating device to promote diffusion and therefore shows a teaching and motivation for providing an emanator on a wick in the apparatus of Wefler et al. Orson et al also teaches that an emanator can be used on a wick with or without the assistance of a heating device or other evaporation rate promoting means. Therefore, there is a teaching and motivation for using an emanator with a wick when a heating device is used to promote evaporation as in the device of Wefler et al. Also, appellant has disclosed that either the end of the wick opposite the reservoir may comprise the emanator or an evaporative surface on the end of the wick may comprise the emanator, therefore the appellant has not disclosed the importance of only providing an evaporative surface on the wick, since both perform equally as well.

As to appellant's argument concerning the oil or fragrance percent by weight in the active gel, note that such recitations are considered to be intended use only and the reservoirs in the apparatuses of Wefler et al and Orson, Sr. are capable of holding such active gels comprising the oils and fragrances in the percent by weight recited.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

This examiner's answer contains a new ground of rejection set forth in section **(9)** above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) **Reopen prosecution.** Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be relevant to the new grounds of rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

(2) **Maintain appeal.** Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).

Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.

Respectfully submitted,

Steven J. Ganey

STEVEN J. GANEY
PRIMARY EXAMINER
6/11/07

A Technology Center Director or designee must personally approve the new ground(s) of rejection set forth in section (9) above by signing below:

KAREN M. YOUNG
DIRECTOR
TECHNOLOGY CENTER 3700

Conferees:

Kevin P. Shaver

Eric S. Keasel